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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

WRS, INC., d/b/a WRS MOTION PICTURE LABRATORIES, a corporation, Plaintiff,	CIVIL ACTION
v.	NO. 00-2041
PLAZA ENTERTAINMENT, INC., a corporation, ERIC PARKINSON, an individual, CHARLES BERNUTH, an individual, and JOHN HERKLOTZ, an individual, Defendants.	

DEFENDANT HERKLOTZ'S REPLY TO PLAINTIFF'S CONCISE STATEMENT OF MATERIAL FACTS IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AS TO DAMAGES AGAINST DEFENDANT, JOHN HERKLOTZ

Defendant, John Herklotz, by his attorneys, John P. Sieminski, Esquire, Chad A. Wissinger, Esquire, and Burns, White & Hickton, LLC, sets forth the following Reply to Plaintiff's Concise Statement of Material Facts in Support of Plaintiff's Motion for Summary Judgment as to Damages against Defendant, John Herklotz, of which the following is a statement:

1. Denied. It is denied that WRS is owed the sum of $2,581.808.58. (Affidavit of Jack Napor, Appendix 15.) The amount stated is not properly quantifiable because, among other reasons, WRS continued to perform services

for Plaza without payment. WRS failed to timely seek Parkinson's credit application, failed to make collection under the Services Agreement, and continued to extend credit to an entity that failed to make timely payments on its accounts. (October 12, 1998 Services Agreement, Appendix 16.) WRS has not produced and cannot even locate documentary evidence that an account receivable was owed to WRS by Plaza as of July 24, 1998. (Napor Deposition, pp. 77:16-25, 78:2-25, Appendix 8.) WRS cannot ascertain whether Plaza's account balance as of August 31, 1998 was $685,379 or $720,679 because WRS was not a fully functional business and has lost track of what was once a voluminous amount of paperwork. (Napor Deposition Exhibit No. 4; Appendix 9; Napor Deposition, pp. 107:23-24, 108:4-10, Appendix 10.) Mr. Napor has no understanding of the total amount of money that was deposited into the lockbox account, or even if actual payments were received through the lockbox. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12.) By way of further response, there is no documentary evidence to support the proposition that WRS is entitled to be paid or that any services were actually rendered under the Services Agreement. (See WRS's Response to Request No. 5 of Herklotz's Second Request for Production of Documents, Appendix 13.) Finally, WRS' computer software produced frequent errors, over billed and under billed clients, added zeros to the quantity of products ordered or the unit prices and inflated the value of invoices. (Napor Deposition, pp 226:11-25, 227:2-13, Appendix 14.) Taken together, these items constitute material issues of fact for trial as it is clear that WRS engaged in a pattern of behavior designed to maximize Defendant

Herklotz's liability under the guarantee, rather than mitigate damages as required by Pennsylvania law.

2. Denied as stated. The Order of Court dated March 23, 2006, summarizes the reasons for the hire of Schneider Downs, Inc. and as a written document speaks for itself. (March 22, 2006 Order of Court, Appendix 2.)

3. Admitted in part and denied in part. It is admitted that on October 6, 2006, Schneider Downs prepared and delivered a Report of their examination of the business records of WRS. It is also admitted that the Report contains the quote:

> "...applied a reasonable basis of accounting with respect to its accounts receivable, revenue and cash receipts cycle surrounding the account for Plaza Entertainment, Inc. and appears to be operating within the normal course of business."

(October 6, 2006 Schneider Downs Report, Appendix 3.) Any further characterization of the Schneider Downs Report is denied as it is a written document that speaks for itself. The inferior quality and depth of the analysis, the limited of scope of the investigation, the mechanical process of "ticking and tying", the failure to investigate WRS' billing practices and the methods employed by Schneider Downs are subject to scrutiny and attack, as more fully outlined in the Affidavit of John Herklotz. (Affidavit of John Herklotz, Appendix 25.) Moreover, Schneider Downs' examination of the underlying books and records of WRS did not establish whether services provided to the Parkinson Affiliates were invoiced to Plaza or that payments made by Plaza applied to obligations of the affiliate companies. Schneider Downs' failure to investigate the allegations that the Parkinson Affiliates ignored corporate formalities in the operation of their various businesses and may have deliberately caused the reported amounts owed by Plaza to be in error necessitates a trial on damages. (October 6, 2006 Schneider Downs Report, Appendix 3.)

4. No response by Defendant Herklotz is required. Plaintiff has not included a paragraph numbered 4 in its Concise Statement of Material Facts.

5. Admitted in part, denied in part. Defendant Herklotz admits that he did not hire a forensic accountant to review the business records kept by WRS. However, Defendant Herklotz has provided an Affidavit for filing herewith offering an opinion on the business records of WRS, and whether damages may be properly calculated using the same. Mr. Herklotz is qualified to provide such an opinion based on his knowledge of the records WRS kept or did not keep and his years as a certified public accountant, and as a financial officer of Chicago Tribune and its subsidiaries. (Affidavit of John Herklotz, Appendix 25.)

6. Denied. Defendant Herklotz denies that he has not pleaded "payment" as an affirmative defense as required by F.R.C.P. 8(c) and that he has not identified any evidence to contradict the amount owed by Plaza Entertainment as reflected in the business records kept by WRS. On the contrary, Defendant Herklotz did plead and present evidence that the amounts shown on WRS business records are not, in fact, the amounts owed and thus guaranteed by Herklotz. Defendant's Answer and Affirmative Defenses filed at the beginning of this action raised multiple issues of material fact relative to damages, as did his subsequent Motion for Summary Judgment. (February 4,

2005 Answer and Affirmative Defenses of Defendant John Herklotz, Appendix 4; February 24, 2006 Motion for Summary Judgment of Defendant John Herklotz, Appendix 5, which is incorporated herein by reference.) Defendant Herklotz asserted that the execution of the Services Agreement and other actions taken by and between WRS and Plaza without Defendant Herklotz's knowledge distorted his responsibilities to such a degree that the guarantee was nullified. By way of further response, Defendant Herklotz denies that he owes any obligation to WRS for WRS's mismanagement of Plaza's operations, for debts WRS irresponsibly incurred by WRS while managing Plaza, for WRS' legal fees, expenses associated with collecting Plaza's bills, marketing Plaza's surplus video titles, maintaining Plaza's bank accounts or for tracking Plaza's records.

7. Admitted in part, denied in part. The Terms and Conditions applicable to the Plaza account is a written document that speaks for itself. It is denied that this language impacts Defendant Herklotz's liability under the guaranty. (Terms and Conditions, Appendix 24.) Additional questions of material fact are created by the execution of the Services Agreement by and between Plaza Entertainment, Inc., and WRS, and the impact of that agreement on the risk, and thus the damages, properly payable by Defendant Herklotz on the Guaranty. (October 12, 1998 Services Agreement, Appendix 16.)

8. Denied as stated. The currently unpaid debt under the Terms and Conditions is not quantifiable because, among other reasons, WRS continued to perform services for Plaza without payment. WRS failed to timely seek Parkinson's credit application, failed to make collection under the Services

Agreement, and continued to extend credit to an entity that failed to make timely payments on its accounts. (October 12, 1998 Services Agreement, Appendix 16.) WRS has not produced and cannot even locate documentary evidence that an account receivable was owed to WRS by Plaza as of July 24, 1998. (Napor Deposition, pp. 77: 16-25, 78:2-25 Appendix 8.) WRS cannot ascertain whether Plaza's account balance as of August 31, 1998 was $685,379 or $720,679 because WRS was not a fully functional business and has lost what was once a voluminous amount of paperwork. (Napor Deposition Exhibit No. 4; Appendix 9; Napor Deposition, pp. 107:23-24, 108:4-10, Appendix 10.) Mr. Napor has no understanding of the total amount of money that was deposited into the lockbox account, or even if actual payments were received through the lockbox. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12.) By way of further response, there is no documentary evidence to support the proposition that WRS is entitled to be paid or that any services were actually rendered under the Services Agreement. (See WRS' Response to Request No. 5 of Herklotz's Second Request for Production of Documents, Appendix 13.) Finally, WRS' computer software produced frequent errors, over billed and under billed clients, added zeros to the quantity of products ordered or the unit prices and inflated the value of invoices. (Napor Deposition, pp 226:11-25, 227:2-13, Appendix 14.)

9. Denied. Any amount of any invoice included in the current amount due can be challenged because, among other reasons, WRS continued to perform services for Plaza without payment. WRS failed to timely seek Parkinson's credit application, failed to make collection under the Services

Agreement, and continued to extend credit to an entity that failed to make timely payments on its accounts. (October 12, 1998 Services Agreement, Appendix 16.) WRS has not produced and cannot even locate documentary evidence that an account receivable was owed to WRS by Plaza as of July 24, 1998. (Napor Deposition, pp. 77: 16-25, 78:2-25 Appendix 8.) WRS cannot ascertain whether Plaza's account balance as of August 31, 1998 was $685,379 or $720,679 because WRS was not a fully functional business and has lost of what was once a voluminous amount of paperwork. (Napor Deposition Exhibit No. 4; Appendix 9; Napor Deposition, pp. 107:23-24, 108:4-10, Appendix 10.) Mr. Napor has no understanding of the total amount of money that was deposited into the lockbox account, or even if actual payments were received through the lockbox. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12.) By way of further response, there is no documentary evidence to support the proposition that WRS is entitled to be paid or that any services were actually rendered under the Services Agreement. (See WRS' Response to Request No. 5 of Herklotz's Second Request for Production of Documents, Appendix 13.) Finally, WRS' computer software produced frequent errors, over billed and under billed clients, added zeros to the quantity of products ordered or the unit prices and inflated the value of invoices. (Napor Deposition, pp 226:11-25, 227:2-13, Appendix 14.)

10. Admitted in part, denied in part. Any invoice sent to Plaza Entertainment, Inc. by WRS is a written document that speaks for itself. It is denied that this language impacts Defendant Herklotz's liability under the guaranty. Additional questions of material fact are created by the execution of

the Services Agreement by and between Plaza Entertainment, Inc., and WRS, and the impact of that agreement on the risk, and thus the damages, properly payable by Defendant Herklotz on the Guaranty.

11. Admitted in part, denied in part. The Terms and Conditions, Services Agreement, Napor Affidavit and the Guaranty Agreement are written documents; each speaks for itself. It is denied that Herklotz agreed to pay for WRS' business advice from its legal counsel. Attorney Reilly has submitted a significant number of time entries for himself and his staff that are not properly chargeable to Defendant Herklotz. These time entries obviously relate to general business advice rendered to Mr. Napor and WRS and have nothing to do with the collection of amounts pursuant to the Guaranty executed by Defendant Herklotz. (Affidavit of Thomas E. Reilly, Esquire, Appendix 17.)

12. Admitted in part, denied in part. It is admitted that Attorney Reilly prepared and filed an Affidavit in support of the legal fees WRS claims it is owed. The Affidavit of Thomas E. Reilly is a written document that speaks for itself. It is denied that Herklotz agreed to pay for WRS' business advice from its legal counsel. Mr. Reilly has submitted a significant number of time entries for himself and his staff that are not properly chargeable to Defendant Herklotz. These time entries obviously relate to general business advice rendered to Mr. Napor and WRS and have nothing to do with the collection of amounts pursuant to the Guaranty executed by Defendant Herklotz. (Affidavit of Thomas E. Reilly, Esquire, Appendix 17.)

13. Admitted in part, denied in part. The Terms and Conditions and The Napor Affidavit and its exhibits are written documents; each speaks for itself. Defendant Herklotz explicitly denies that he is responsible for the storage of material by WRS in the amount of $38,850 and interest in the sum of $12,080.25. The amount stated is not properly quantifiable. WRS performed services for Plaza without payment, failed to timely seek Parkinson's credit application, failed to make collection under the Services Agreement, and extended credit to an entity that did not make timely payments. (October 12, 1998 Services Agreement, Appendix 16.) WRS has not produced and cannot even locate documentary evidence that an account receivable was owed as of July 24, 1998. (Napor Deposition, pp. 77:16-25, 78:2-25 Appendix 8.) WRS cannot ascertain Plaza's account balance as of August 31, 1998 because WRS was not a fully functional business and lost what was once a voluminous amount of paperwork. (Napor Deposition Exhibit No. 4; Appendix 9; Napor Deposition, pp. 107:23-24, 108:4-10, Appendix 10.) Mr. Napor has no understanding of the monies or payments associated with the lockbox accounts. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12.) By way of further response, there is no documentary evidence to support the proposition that WRS is entitled to be paid or that any services were actually rendered under the Services Agreement. (See WRS's Response to Request No. 5 of Herklotz's Second Request for Production of Documents, Appendix 13.) Finally, WRS' computer software produced frequent errors, over billed and under billed clients, added zeros to the quantity of products ordered or the unit prices and inflated the value of invoices. (Napor

Deposition, pp 226:11-25, 227:2-13, Appendix 14.) Plaintiff has failed to provide the evidence that verifies, corroborates or supports these amounts. Altogether, these items constitute material issues of fact for trial as it clear that WRS engaged in a pattern of behavior designed to maximize Defendant Herklotz's liability under the guarantee, rather than mitigate damages as required by Pennsylvania law.

14. Denied. Defendant Herklotz denies that WRS was entitled to a minimum monthly payment of $5,000 from November of 1998 to December 31, 2000 for a period of 25 months or a total of $125,000. There is no evidence that any service was provided, and the amount stated is not properly quantifiable. By way of further response, Mr. Napor has no understanding of the monies or payments associated with the lockbox accounts, and there is no documentary evidence to support the proposition that WRS is entitled to be paid or that any services were actually rendered under the Services Agreement. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12.)

15. Denied. Defendant Herklotz explicitly denies that the total amount owed exclusive of interest is the sum of $1,205,827.84. The amount stated is not properly quantifiable. WRS performed services for Plaza without payment, failed to timely seek Parkinson's credit application, failed to make collection under the Services Agreement, and extended credit to an entity that did not make timely payments. (October 12, 1998 Services Agreement, Appendix 16.) WRS has not produced and cannot even locate documentary evidence that an account receivable was owed as of July 24, 1998. (Napor Deposition, pp. 77: 16-25,

78:2-25, Appendix 8.) WRS cannot ascertain Plaza's account balance as of August 31, 1998 because WRS was not a fully functional business and lost what was once a voluminous amount of paperwork. (Napor Deposition Exhibit No. 4; Appendix 9; Napor Deposition, pp. 107:23-24, 108:4-10, Appendix 10.) Mr. Napor has no understanding of the monies or payments associated with the lockbox accounts. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12.) By way of further response, there is no documentary evidence to support the proposition that WRS is entitled to be paid or that any services were actually rendered under the Services Agreement. (See WRS' Response to Request No. 5 of Herklotz's Second Request for Production of Documents, Appendix 13.) Finally, WRS' computer software produced frequent errors, over billed and under billed clients, added zeros to the quantity of products ordered or the unit prices and inflated the value of invoices. (Napor Deposition, pp 226:11-25, 227:2-13, Appendix 14.) Plaintiff has failed to provide the evidence that verifies, corroborates or supports these amounts. All told, these items constitute material issues of fact for trial as it clear that WRS engaged in a pattern of behavior designed to maximize Defendant Herklotz's liability under the guarantee, rather than mitigate damages as required by Pennsylvania law.

16. Denied. Defendant Herklotz vehemently denies that, based upon the business records of WRS, the total amount due and owing to WRS as of October 31, 2006 is $2,527,029.03 plus interest in the amount of $1,205,827.84 and additional attorney's fees for enforcement of a judgment. The amounts stated are not properly quantifiable. WRS performed services for Plaza without

payment, failed to timely seek Parkinson's credit application, failed to make collection under the Services Agreement, and extended credit to an entity that did not make timely payments. (October 12, 1998 Services Agreement, Appendix 16.) WRS has not produced and cannot even locate documentary evidence that an account receivable was owed as of July 24, 1998. (Napor Deposition, pp. 77:16-25, 78:2-25, Appendix 8.) WRS cannot ascertain Plaza's account balance as of August 31, 1998 because WRS was not a fully functional business and lost what was once a voluminous amount of paperwork. (Napor Deposition Exhibit No. 4; Appendix 9; Napor Deposition, pp. 107:23-24, 108:4-10, Appendix 10.) Mr. Napor has no understanding of the monies or payments associated with the lockbox accounts. (Napor Deposition, pp. 144:3-6, 198:7-25, 199:2-3, Appendix 12.) By way of further response, there is no documentary evidence to support the proposition that WRS is entitled to be paid or that any services were actually rendered under the Services Agreement. (See WRS's Response to Request No. 5 of Herklotz's Second Request for Production of Documents, Appendix 13.) Finally, WRS' computer software produced frequent errors, over billed and under billed clients, added zeros to the quantity of products ordered or the unit prices and inflated the value of invoices. (Napor Deposition, pp 226:11-25, 227:2-13, Appendix 14.) Plaintiff has failed to provide the evidence that verifies, corroborates or supports these amounts. Taken as a whole, these items constitute material issues of fact for trial as it clear that WRS engaged in a pattern of behavior designed to maximize Defendant Herklotz's

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liability under the guarantee, rather than mitigate damages as required by Pennsylvania law.

WHEREFORE, Defendant Herklotz respectfully requests that WRS' Motion for Summary Judgment on Damages be denied.

Respectfully submitted,

BURNS, WHITE & HICKTON, LLC

By: /s/ John P. Sieminski

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